83-889

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. ____

TELINA NELSON, *a minor*, by Cindra R. Carson, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*,

v.

PARK INDUSTRIES, INC., *Defendant*,
UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendant*,
F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY, *Defendants-Respondents*,
and
BUNNAN TONG & COMPANY, LTD., *Defendant-Petitioner*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 15, 1983

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution permits the exercise of personal jurisdiction in Wisconsin over a Hong Kong exporter and buying representative for United States merchants who maintains no offices, employees or business relations in Wisconsin or any state or territory of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Bunnan Tong & Company, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 13, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The opinion of the District Court for the Western District of Wisconsin, not yet reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 13, 1983. A timely petition for rehearing en banc was denied on October 28, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution permits the exercise of personal jurisdiction in Wisconsin over a Hong Kong exporter and buying representative for United States merchants who maintains no offices, employees or business relations in Wisconsin or any state or territory of the United States.

STATEMENT OF THE CASE

This matter involves a claim for damages by and on behalf of Telina Nelson for injuries allegedly suffered when a shirt purchased for her at a F.W. Woolworth store in Rice Lake, Wisconsin, came in contact with an open flame. The shirt in question was purchased by Bunnan Tong & Company, Ltd. (Bunnan Tong), at the direction of F. W. Woolworth Company (Woolworth), from United Garment Manufacturing Company, Ltd. (United), the manufacturer. Bunnan Tong selected material and made its purchase pursuant to Woolworth's specifications, took delivery of the shirt from United, and, pursuant to Woolworth's instructions, delivered the shirt to Western Navigation (Fareast), Ltd. of Kowloon, Hong Kong.

Bunnan Tong is a Hong Kong corporation, and has never had any physical presence in the state of Wisconsin, or in any other state of the United States. No representative of Bunnan Tong has ever visited the state of Wisconsin. Bunnan Tong acted as Woolworth's buying representative for purchase of the shirt in question, conferring with Woolworth representatives in Hong Kong and purchasing the shirt in question in Hong Kong for an agreed commission. Bunnan Tong did nothing to the shirt in question to prepare the shirt or its packaging for sale. Bunnan Tong took delivery of the shirt from United "FOB Hong Kong" and delivered the shirt to Woolworth's shipper in Hong Kong. Bunnan Tong's only involvement with the shirt ended at that point.

The shirt was distributed and marketed in the United States by Woolworth, pursuant to Woolworth's distribution and marketing decisions and in a market developed by Woolworth. Bunnan Tong at no time participated in or was able to exercise any control over Woolworth's market development or distribution and marketing decisions. Bunnan Tong received a copy of the summons and complaint in this matter in Hong Kong.

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(a). Bunnan Tong's motion to dismiss for lack of personal jurisdiction was granted by the District Court for the Western District of Wisconsin on September 16, 1982. Appendix B. Woolworth appealed that decision,

and on September 13, 1983, the United States Court of Appeals for the Seventh Circuit reversed. Appendix A. A timely petition for rehearing *en banc* was denied on October 28, 1983. Appendix C.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The opinion of the Seventh Circuit Court of Appeals in this case holds that even though Bunnan Tong made no effort to distribute or market the shirt in question in any state of the United States, had no part in originating Woolworth's distribution system and had no input or control concerning the maintenance and development of that system, Bunnan Tong acted to place the shirt in a stream of commerce which ultimately ended at a Wisconsin Woolworth store, and is therefore subject to personal jurisdiction in Wisconsin.

> *Bunnan and United were aware of the Woolworth distribution scheme and derived economic benefits from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that Bunnan and United were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt and allegedly caused injury. (Appendix A, p. 10.)*

In making its decision, the Seventh Circuit concluded that this Court's opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), adopted a stream of commerce analysis which would find constitutionally permissible personal jurisdiction whenever a foreign citizen or corporation handles a product in a stream of commerce, whether or not it exercises any control over the distribution and sale of that product. See text and footnote at Appendix A, pp. 8–9.

In announcing its interpretation of *World-Wide Volkswagen*, the Seventh Circuit placed itself in direct conflict with the decisions of the Courts of Appeals for the Third, Fifth and Ninth Circuits. The Court of Appeals for the Third Circuit, in *DeJames v. Magnificence Carriers, Inc.*, 654 F. 2d 280 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), recognized that under the principles explained in *World-Wide Volkswagen*, a defendant manufacturing ships for transporting commerce intended for the United States was not subject to personal jurisdiction in a state where those ships could be expected to regularly dock.

The Court of Appeals for the Ninth Circuit, first in *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F. 2d 1175 (1980), *cert. denied*, 449 U.S. 1062 (1980), and then in *Insurance Company of North America v. Marina Salina Cruz*, 649 F. 2d 1266 (1981), has agreed with the Third Circuit's interpretation of *World-Wide Volkswagen*. In *Kramer*, the Ninth Circuit found that even a significant interest in promoting car sales in the United States and the approval of the marketing scheme developed by its United States subsidiary did not constitute the kind of deliberate invoking of forum protection by a foreign corporation required for personal jurisdiction by *World-Wide Volkswagen*. In *Insurance Company of North America*, the Ninth Circuit found that the extensive conversion of a fishing vessel known to be intended for service in Alaskan waters did not subject the foreign defendant to personal jurisdiction in Alaska.

Most recently, the Court of Appeals for the Fifth Circuit, in *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A.*, 703 F. 2d 143 (1983), has announced its interpretation of the *World-Wide Volkswagen* due process limitations on personal jurisdiction in direct conflict with the decision in this case. In *Talbot*, the Fifth Circuit found that the knowledge of and participation in Hinomoto's national distribution scheme by a West Coast based importer serving Hinomoto was not sufficient for personal jurisdiction in a state served by Hinomoto but not directly serviced by the importer.

In each of these cases, the Court of appeals for the Third, Fifth and Ninth Circuits have recognized the limitation of minimum contacts on the stream of commerce analysis of exercise of personal jurisdiction consistent with the due process clause of the fourteenth amendment as explained in *World-Wide Volkswagen*.The opinion of the Seventh Circuit in this case specifically rejects this limitation of the stream of commerce analysis, holding instead that Bunnan Tong, merely because it helped to place the shirt in question into the national retail market established and controlled by Woolworth, "...should reasonably anticipate being subject to suit in any forum within that market where their product caused injury." Appendix A, p. 9.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS REGARDING EFFORTS TO INVOKE PERSONAL JURISDICTION IN STATE AND FEDERAL COURTS.

This Court in its decision in *World-Wide Volkswagen Corp. v. Woodson, supra*, p. 3, gave clear and specific direction to state and federal courts considering the question of the due process limitations imposed on exercise of personal jurisdiction over nonresident defen-

dants with their principal places of business in United States jurisdictions other than the forum state. This Court has not spoken, however, concerning the application of the principles set forth in *World-Wide Volkswagen* to non-United States nationals. With world trade increasing significantly every year, and with the economy of the United States, and each individual state, ever more dependent on the continuing orderly expansion of that trade, questions concerning personal jurisdiction over non-United States corporations and individuals are ever more important. Questions involving personal jurisdiction over such non-United States corporations and individuals have become common and are continuing to increase, and both litigants and lower courts urgently need the assistance of this Court in understanding the principles to be applied in their resolution. Among the unanswered questions to be considered are:

(1) Should the principles and analysis of *World-Wide Volkswagen* apply to non-United States corporations and individuals? *Worldwide Volkswagen* considers the interstate limits on state jurisdiction imposed by the due process clause of the fourteenth amendment, with the due process clause "... acting as an instrument of interstate federalism, ..." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 294. The principle of interstate federalism is, however, inapposite to questions involving personal jurisdiction over non-United States corporations or individuals. The underlying concern for protecting the powers of co-equal sovereigns is, however, precisely relevant to the question of assertion of personal jurisdiction over foreign citizens and corporations with no physical presence or contacts within the United States. Because the Court's entire opinion in *World-Wide Volkswagen* is predicated on construing the due process clause as an instrument of federalism, litigants and lower courts are without guidance as to what, if any, currency should be given those principles when interests of other nations are involved.

(2) Should the analysis of *Worldwide Volkswagen*, or some other analysis, apply to each personal or corporate cog in an interstate or international distribution scheme for purposes of determining personal jurisdiction? The opinion of the Seventh Circuit in this case cites no less than nine cases as supporting its reading of *World-Wide Volkswagen* as creating a distinction with regard to extension of personal jurisdiction over manufacturers and primary distributors on one hand and secondary distributors and retailers on the other, but recognizes in a footnote that the cases cited involve manufacturers and distributors "...who governed their own distribution systems and/or also engaged in activities in the forum soliciting sales of their products." Appendix A, pp. 7-8.

Bunnan Tong is not such a controlling participant in the stream of commerce. Rather, Bunnan Tong is a local Hong Kong expediter, a middleman, the conduit for the passage of the shirt in question from its manufacturer to Woolworth's shipper. The Seventh Circuit agrees that Bunnan Tong is unable to exercise any control over the existence or development of Woolworth's marketing system, but finds that mere knowledge of the existence of that system is sufficient for jurisdiction. Appendix A, pp. 8–9.

The Fifth Circuit, on the other hand, finds in *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A., supra*, p. 4, that a United States based importer servicing a United States distributor, aware of the distributor's nationwide marketing scheme and supplying products at certain points in that scheme, is not subject to personal jurisdiction in a state a part of that scheme but not directly serviced by the distributor. Should Bunnan Tong or that importer—or neither of them—or both of them—be subject to personal jurisdiction?

(3) Should manufacturers, distributors and other middlemen be permitted to structure their business relationships in the United States so as to intentionally limit jurisdictionally sufficient contacts to a limited number of states? The Fifth Circuit Court of Appeals, in *Talbot*, recognizes that the importer defendant:

> *. . . deliberately structured its relationship with Hinomoto and Toyosha so as to be subject to suits only in a limited number of states; the legal system should have a "degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." Volkswagen, supra,* at 297, 100 S. Ct. at 567. *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A.*, 703 F. 2d at 145.

The decision of the Seventh Circuit in this case completely fails to recognize this facet of foreseeability. Under the Seventh Circuit's decision, a conduit company in the stream of commerce, such as Bunnan Tong, is in an impossible position. It has no direct contacts anywhere within the United States and no control over Woolworth's distribution and marketing system. Knowing only that Woolworth is a national retailer, Bunnan Tong must attempt to anticipate and understand the laws of each state and territory where Woolworth may choose to do business, and be prepared to defend itself in every jurisdiction where Woolworth's markets may reach. For smaller companies, the only choice may be to refuse to do business with United States businesses

with large regional or national markets, or to ruiniously raise the prices of their services.

3. THE DECISION BELOW INCORRECTLY INTERPRETS AND APPLIES THE LIMITATIONS ON PERSONAL JURISDICTION IMPOSED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSITUTION.

World-Wide Volkswagen Corp. v. Woodson, supra, p.3, establishes a series of "affiliating circumstances", the presence of which are necessary for the exercise of personal jurisdiction consistent with due process:

> *. . . we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. 444 U.S. at 295.*

The opinion of the Seventh Circuit below does not apply the affiliating circumstances standards. Instead, the opinion applies a stream of commerce analysis without the affiliating circumstances limitations:

> *. . . However, even though Bunnan and United did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along the stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. . . If they were aware [of Woolworth's distribution system] they were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury. Appendix A, pp. 8-9, (Footnote omitted)*

Rather than reviewing Bunnan Tong's conduct for some evidence of affiliating circumstances that would indicate some purposeful effort on the part of Bunnan Tong to serve a market in Wisconsin, the Seventh Circuit has instead emphasized Bunnan Tong's delivery of the shirt to Woolworth with the knowledge that Woolworth has nationwide United States operations. Bunnan Tong's mere participation in the stream of commerce, with the knowledge that that stream of commerce ends in a national United States market, is deemed sufficient for personal jurisdiction.

Bunnan Tong did nothing to personally avail itself of the privilege of conducting business within the state of Wisconsin, and it made no effort to directly or indirectly serve a Wisconsin market. In fact, Bunnan Tong was without any actual knowledge that Woolworth's national market included Wisconsin and could not have made any effort to directly or indirectly serve the Wisconsin market had it knowr . These critical factors in determining the validity of personal jurisdiction as set forth in *World-Wide Volkswagen* were simply not considered by the court below.

Indeed, it is clear from a review of the Seventh Circuit's opinion below that the Court has failed to distinguish the test for the defendant's possible liability in tort from the standard necessary to properly invoke personal jurisdiction within the limitations imposed by the due process clause of the fourteenth amendment. Cf., *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326 at 1341 and accompanying footnote (2nd Cir. 1972). It is clear that Bunnan Tong's conduct may subject it to liabililty in tort, especially in the area of product liability. It is equally clear, however, that Bunnan Tong has not participated in delivering the shirt in question "...into the stream of commerce *with the underlying expectation that they will be purchased by consumers in [Wisconsin]."World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 298 (emphasis supplied). Bunnan Tong's conduct in this case in no way constitutes that structuring that would give Bunnan Tong some assurance that it would be liable to suit in Wisconsin. Bunnan Tong quite plainly does not have those minimum contacts or "affiliating circumstances" with Wisconsin that are the necessary predicate to any exercise of Wisconsin personal jurisdiction within the limitations imposed by the due process clause of the fourteenth amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the opinion of the Seventh Circuit.

Respectfully submitted,

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November 15, 1983

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor, by* CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*

v.

PARK INDUSTRIES, INC., *Defendant*,

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 463—John C. Shabaz, *Judge*.

ARGUED JUNE 6, 1983—DECIDED SPETEMBER 13, 1983

Before BAUER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

FLAUM, *Circuit Judge*. This appeal challenges two dismissal orders entered by the district court. In separate orders, the district court determined that it lacked personal jurisdiction over defendants Bunnan Tong & Company ("Bunnan") and United Grament Manufacturing Company ("United"). For the reasons stated below, we reverse both orders.

This diversity action is a products liability case in which the minor plaintiff seeks recovery for severe burns sustained when the cotton flannel shirt she was wearing ignited after contact with the flame from a butane cigarette lighter.[1] The amended complaint ("complaint") names the following parties as defendants: F.W. Woolworth Company ("Woolworth"), the retail seller of the flannel shirt; Travelers Insurance Company ("Travelers"), Woolworth's insurer; Bunnan, Woolworth's purchasing agent for the flannel shirt; and United, the manufacturer of the flannel shirt.[2] The complaint states four causes of action, alleging both negligence and strict liability theories against the defendants.

Bunnan moved to dismiss the complaint against it pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. In a brief order, the district court found that Bunnan has no contacts or relations with the State of Wisconsin and that there was no more than a mere likelihood that the flannel shirt supplied by Woolworth would find its way into Wisconsin. The court concluded therefore that the decision in *World-Wide Volkswagen Corp. v. Woodson ("World-Wide Volkswagen")*, 444 U.S. 286 (1980), is controlling and it granted Bunnan's motion.[3] United then made a similar motion to dismiss. In a memorandum opinion and order, the district court again found *World-wide Volkswagen* controlling and it granted United's motion to dismiss. Plaintiffs and Woolworth appeal from these two dismissal orders.

To determine whether exercising personal jurisdiction is proper, a court may receive and weigh affidavits prior to trial on the merits. *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971). During this preliminary proceeding, although the burden of proof rests on the party asserting jurisdiction, if the district court's deci

[1] In one cause of action, the minor plaintiff's parents also seek recovery for certain medical expenses incurred and for the deprivation of society and companionship of their daughter.

[2] The complaint also names "ABC Corporation," which is a fictitious name for the unknown manufacturer of the fabric used for the flannel shirt.

[3] Woolworth's and Travelers' motion to reconsider this order was denied.

sion is based on the submission of written materials the burden of proof is met by a prima facie showing that personal jurisdiction is conferred under the relevant jurisdictional statute. *Id.; see also Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1190 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980). Further, the party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record. *Id.* Applying these standards, the following facts underlie this appeal.

United and Bunnan are both foreign corporations and neither company has ever had any physical presence in the State of Wisconsin. United is incorporated under the laws of Hong Kong and it is in the business of manufacturing textile products in Hong Kong. From 1973 to 1977, United manufactured all of the 100% cotton flannel boys shirts ("flannel shirts") purchased by Woolworth for resale in the United States. There was, however, no direct commercial relationship between United and Woolworth. Rather, Woolworth retained the services of Bunnan, which is also a company incorporated under the laws of Hong Kong. Bunnan is an exporter and agent for foreign buyers of general merchandise, including textile products manufactured in Hong Kong and other Southeast Asian countries. Bunnan and Woolworth have had a business relationship since the end of World War II. This relationship has consisted of a series of buying agreements in which Bunnan agrees to act as a buying representative for Woolworth. The services Bunnan performs in that capacity include buying product samples, placing purchase contracts, inspecting products before shipment to Woolworth, acting as Woolworth's representative in efforts to obtain reimbursement from a manufacturer for defective merchandise, and holding Woolworth harmless from certain claims made against Woolworth involving the merchandise purchased by Woolworth through Bunnan.

The flannel shirt worn by the minor plaintiff in this case was manufactured by United in Hong Kong, purchased on behalf of Woolworth by Bunnan in Hong Kong, and sold at a Woolworth retail store by Woolworth in Wisconsin. The shirt was one from a purchase order placed by Woolworth with Bunnan in October 1976 for 4,300 dozen flannel shirts. Bunnan filled this purchase order with shirts manufactured by United. The shirts were packaged at United's factory with a label bearing the brand name "Topsall." Those labels were manufactured and placed on the shirts by United. Bunnan purchased the shirts

from United "F.O.B. Hong Kong." The shirts were delivered by Bunnan to a shipper in Hong Kong which had been selected by Woolworth. This shipper then arranged the transportation of the shirts from Hong Kong to New York, Boston, Philadelphia, San Francisco and Los Angeles at Woolworth's expense. Several of these shirts eventually were displayed in a Woolworth retail store in Wisconsin and one was purchased for the minor plaintiff in this case.

A federal court has personal jurisdiction over the parties in a diversity action only if a court in the state in which the federal court is sitting would have jurisdiction. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 598 (7th Cir. 1979). In addition, Fed. R. Civ. P. 4(e) requires that if no federal statute provides for the manner of service, service is governed by the law of the state in which the district court sits. The applicable statute in this case is Wisconsin's long arm statute, Wis. Stat. § 801.05 (1981-82). That section provides for personal jurisdiction over an out-of-state defendant

> *[i]n any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, providing in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.*

Wis. Stat. § 801.05(4)(b) (1981-82). There are constitutional limits, however, on the reach of this long arm statute. These limits, most recently described by the Supreme Court in *World-Wide Volkswagen*, 444 U.S. at 291-94, were relied on by the district court in dismissing United and Bunnan.

Beginning our analysis with the long arm statute, there is no question in this case that United is subject to suit under the language of that statute. United manufactured flannel shirts in Hong Kong and the one allegedly causing injury was purchased and used in Wisconsin. Bunnan, however, argues for the first time on appeal that its alleged actions in this lawsuit do not come within the purview of the long arms statute. Specifically, Bunnan submits that the complaint does not allege that Bunnan "processed, serviced or manufactured" the flannel shirt at issue here. In addition, Bunnan contends that it did nothing to prepare any of the shirts for sale. We are not persuaded by Bunnan's technical pleading argument or its narrow reading of the long arm statute. Federal Rule of

Civil Procedure 8(a)(1) requires only a short and plain statement of the grounds upon which jurisdiction depends, not a verbatim repetition of the language of the long arm statute. The complaint alleges that Bunnan is in the business of selling and/or distributing children's clothing for resale to the public and specifically that Bunnan distributed to Woolworth certain flannel shirts, one of which ultimately was purchased in Wisconsin for the minor plaintiff. These allegations are sufficient to meet the pleading requirements if the conduct described falls within the scope of the long arm statute. In this regard, the parties and court have not located any case law interpreting the phrase "processed, serviced or manufactured."[4] As a general principle though, the Wisconsin Supreme Court has determined that the long arm statute should "be given a liberal construction in favor of the exercise of jurisdiction." *Stevens v. White Motor Corp.*, 77 Wis. 2d 64, 74, 252 N.W. 2d 88, 93 (1977). Under such a liberal construction, we conclude that the word "processed" should be interpreted to include a distributor's purchase and sale of goods in the normal course of the distribution of those goods.[5] Therefore, both Bunnan and United are subject to suit under the long arm statute, unless the exercise of jurisdiction over them would be inconsistent with due process.

The due process question raised here requires an interpretation and application of the holding and certain dictum in *World-Wide Volkswagen* concerning the stream of commerce theory of personal

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[4] The Wisconsin Supreme Court has determined that the shipment from out of state of a pet dog as a gift did not constitute "products, materials or things processed, serviced or manufactured by the defendant" as set forth in Wis. Stat. 801.05(4)(b) (1981–82). *Lincoln v. Seawright*, 104 Wis. 2d 4, 310 N.W. 2d 596 (1981). The court acknowledged that the long arm statute should be liberally construed, but it also noted that the statute could not be ignored. The court's analysis, however, did not require it to examine the meaning of each word of the quoted passage and the opinion provides no guidance for us here.

[5] The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process. *See* Webster's Third New International Dictionary of the English Language (1963). We think these broader definitions include the actions of a distributor such as Bunnan, i.e., purchasing and selling goods in the ordinary course of trade in a distribution system.

jurisdiction in a products liability case. In *World-Wide Volkswagen*, the Court considered the property of an Oklahoma court's exercise of personal jurisdiction over two defendants in a products liability case. The plaintiffs in that case claimed injuries from an automobile accident that occurred in Oklahoma. They alleged that their foreign-manufactured automobile was defective and they sued the manufacturer, the importer, the regional distributor, and the retail dealer of the automobile. The regional distributor and retail dealer challenged the court's personal jurisdiction over them. Both defendants were incorporated in and had their places of business in New York, and that state was also where the plaintiffs had purchased the automobile.

The plaintiffs argued that the two defendants should be amenable to suit in Oklahoma because it was foreseeable that an automobile purchased in New York would cause injury in Oklahoma. The Court rejected these arguments, reasoning that a seller of chattels cannot be deemed to have appointed the chattel as his agent for service of process and that his amenability to suit does not travel with the chattel. The Court, however, did note that foreseeability is not irrelevant to the personal jurisdiction issue. It stated, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. In further explanation of this point the Court observed,

> *[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

World-Wide Volkswagen, 444 U.S. at 297-98.

Applying those principles to the case before it, the Court found no basis for Oklahoma jurisdiction over the regional distributor or retail dealer of the automobile. The retail dealer's sales were made in a city in New York and the regional distributor's market was limited to the states of New York, New Jersey and Connecticut. There were no contacts between those defendants and Oklahoma other than the fact that the plaintiffs had driven the automobile to that state and an injury occurred there. In addition, the court determined that whatever marginal revenues the two defendants received because the products they sold were capable of use in Oklahoma was too attenuated a contact to justify that state's exercise of personal jurisdiction over them. The Court therefore reversed the Oklahoma Supreme Court's decision upholding jurisdiction.

The *World-Wide Volkswagen* Court's recognition of a distinction among the various entities that might compose a distribution system of a product is pivotal to the decision in this case. The two defendants in *World-Wide Volkswagen* who were not amenable to Oklahoma jurisdiction were at the end of the automobile's distribution system. The scope of the foreseeble market served by those defendants and of the benefits those defendants derived from the sale of the product was narrow. In contrast, the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market. *See Hendrickson v. Reg O Co.*, 657 F.2d 9 (3d Cir. 1981); *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 1083 (1980); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); *Samuels v. BMW of North America, Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983); *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Augusta*, 553 F. Supp. 328 (E.D. Pa. 1982); *see also Froning & Deppe, Inc. v. Continental*

Illinois National Bank & Trust Co., 695 F.2d 289, 291-93 (7th Cir. 1982).[6]

In this action, United's and Bunnan's functions in the distribution of the flannel shirts place them at the start of the system. This case, thus, is distinguishable from the facts underlying the holding of *World-Wide Volkswagen* because United and Bunnan are early actors in a distribution system which places and moves the product in the stream of commerce. *World-Wide Volkswagen* is also different because the allegedly defective product here not only caused injury in the forum, but it was also purchased there. The question remains, though, whether under the distribution system used here it can be said that United's and Bunnan's conduct and their connection with Wisconsin are such that they should reasonably anticipate being haled into court there.

In opposing jurisdiction, United and Bunnan maintain that the flannel shirt at issue was sold in Wisconsin only because of Woolworth's actions rather than theirs. They point out that Woolworth sought out Bunnan in Hong Kong and that Bunnan independently contacted United. Further, United submits that it had no control over the flannel shirts once they were sold to Bunnan and that it made no efforts to distribute the shirts anywhere. However, even though Bunnan and United did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along a stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. In determining whether it is reasonable to hale Bunnan and United into court in Wisconsin, a critical fact is whether those defendants were aware of that distribution system. If they were aware, they were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum

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[6] These cases generally involve manufacturers or distributors who governed their own distribution systems and/or also engaged in activities in the forum soliciting sales of their products. Although evidence that a defendant manages its own distribution system or engages in other contacts with a forum presents a stronger case for exercising personal jurisdiction, such conduct is not a minimal requirement for jurisdiction as long as it can be said that a defendant's conduct and connection with a particular forum are such that it should reasonably anticipate being haled into court in that forum. *See World-Wide Voldkwagen*, 444 U.S. at 297-98; *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

within that market where their product caused injury.[7]

In regard to the knowledge issue, affidavits, submitted by Woolworth allege that both Bunnan's and United's personnel were aware of Woolworth's distribution of products for retail sale in the ordinary course of trade. Bunnan does not dispute this fact and it would seem likely that it is true, since Bunnan has had direct contractual relations with Woolworth for many years and employees of the two companies have visited each other's offices in Hong Kong and New York many times. United's knowledge of the flannel shirts' distribution is a closer question. The district court noted that United was possibly aware of the scheme of distribution, but it found that United had no knowledge or expectation that Wisconsin consumers would purchase its shirts. *Nelson v. F.W. Woolworth Co.*, No. 81 C 646, slip op. at 6 (W.D. Wis. Jan. 14, 1983). We find, however, that on the record established and under the standards governing at this stage of the litigation, United was more than possibly aware of Woolworth's distribution system. The Woolworth affidavits indicate that Woolworth personnel annually visited United's premises and that one of United's directors knew that the shirts manufactured under the "Topsall" label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.[8] These allegations are sufficient for a prima facie showing and we therefore must assume United had full knowledge of the distribution scheme.

---

[7] The district court determined that United did not deliver its products into the stream of commerce apparently because Woolworth went to Hong Kong to import flannel shirts and then distributed and sold them in the United States. We find this analysis of the stream of commerce theory too narrow. A manufacturer places a product in a stream of commerce whether it controls the distribution of the product or not. The relevant question for due process purposes in a personal jurisdiction challenge is whether the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 298. *See also* footnote 6 *supra*.

[8] Apparently, virtually all printed flannel shirts sold in the United States enter this country through some distribution system originating in a foreign country because 85% to 90% of all those shirts are manufactured by businesses outside the United States.

Woolworth's established distribution system funneled thousands of flannel shirts into its retail stores throughout the United States. For many years Bunnan acted as Woolworth's buying agent for those flannel shirts and for several years United manufactured them. The normal course of the distribution system brought several shirts to a retail store in Wisconsin and one was purchased for the minor plaintiff in this case. Bunnan and United were aware of the Woolworth distribution scheme and derived economic benefit from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that Bunnan and United were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt and allegedly caused injury. Therefore, we reverse the two orders dismissing United and Bunnan from this action for lack of personal jurisdiction.

It is so ordered.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX A

Opinion by Judge Flaum

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

SEPTEMBER 13, 1983.

HON. WILLIAM J. BAUER, Circuit Judge,
HON. JOEL M. FLAUM, Circuit Judge,
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs-Appellees*,

v.

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 463—John C. Shabaz, *Judge*.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

In the
UNITED STATES DISTRICT COURT
for the Western District of Wisconsin

TELINA NELSON, *a minor*, by Cindra R. Carson,
Guardian ad Litem, GERALD NELSON, and
SHERRY NELSON, *Plaintiffs*,

v.

F.W. WOOLWORTH COMPANY, a foreign corporation,
TRAVELERS INSURANCE COMPANY, a foreign corporation,
PARK INDUSTRIES, INC., a foreign corporation,
BUNNAN TONG AND COMPANY, LTD., a foreign corporation,
UNITED GARMENT MANUFACTURING COMPANY, LTD.,
a foreign corporation, and
ABC CORPORATION, *Defendants*.

Motion to dismiss by defendant Bunnan Tong and Company, Ltd. having been scheduled for hearing before the Court on September 15, 1982, the Hon. John C. Shabaz, District Judge, presiding, the plaintiffs having appeared by Guelzow, Aubry, Senteney & Carson, by George H. Senteney; the defendants F.W. Woolworth and Travelers Insurance Company having appeared by Riordan, Crivello, Carlson, Mentkowski & Henderson, by Frank T. Crivello; the defendant Park Industries, Inc. by Carroll, Parroni, Postlewaite, Anderson & Graham, by Arnold P. Anderson; and the defendant Bunnan Tong and Company, Ltd., by Bell, Metzner & Hierhart, by John M. Moore and Barrett J. Corneille,

And the Court being of the opinion that the decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, is controlling, and this Court being of the opinion that the defendant Bunnan Tong and Company, Ltd. has no contacts, ties or relations whatsoever with the State of Wisconsin, and that there is no more than a mere likelihood that the product supplied by the defendant Bunnan Tong to the defendant F.W. Woolworth will find its way into the state of Wisconsin,

Now, therefore,

ORDER

IT IS ORDERED that the motion of the defendant Bunnan Tong and Company, Ltd. to dismiss is GRANTED.

Entered this 16th day of September, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
OCTOBER 28, 1983.
BEFORE

HON. WILLIAM J. BAUER, Circuit Judge,
HON. JOEL M. FLAUM, Circuit Judge,
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*

v.

PARK INDUSTRIES, INC., *Defendant*, *F. W. WOOLWORTH COMPANY* and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 643—John C. Shabaz, *Judge*.

On September 27, 1983, defendant-appelles filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

No. 83-889

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

BUNNAN TONG & COMPANY, LTD., *Defendant-Petitioner,*

v.

F. W. WOOLWORTH COMPANY and
TRAVELERS INSURANCE COMPANY, *Defendants-Respondents,*

and

TELINA NELSON, *a minor,* by Cindra R. Carson,
Guardian ad Litem, GERALD NELSON, and
SHERRY NELSON, *Plaintiffs-Respondents.*

On Petition For a Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

Supplemental Brief of Petitioner

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January 4, 1984

CITATIONS

CASES:

83-889

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BUNNAN TONG & COMPANY, LTD., *Defendant-Petitioner,*

v.

F. W. WOOLWORTH COMPANY and
TRAVELERS INSURANCE COMPANY, *Defendants-Respondents,*

and

TELINA NELSON, *a minor,* by Cindra R. Carson,
Guardian ad Litem, GERALD NELSON, and
SHERRY NELSON, *Plaintiffs-Respondents.*

On Petition For a Writ of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

Supplemental Brief of Petitioner

On November 15, 1983, Bunnan Tong & Company, Ltd.[1] filed its petition for writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals in the above matter. Since that date, the United States Court of Appeals for the Fifth Circuit has decided *C & H*

[1] Bunnan Tong & Company, Ltd. has no parent company, no subsidiaries other than wholly-owned subsidiaries and no affiliates.

Transportation Co., Inc. v. Jensen & Reynolds Construction Co., reported at 719 F. 2d 1267 (5th Cir. 1983). In its November 21, 1983 opinion, the Fifth Circuit has reaffirmed the position it has taken since this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); that *World-Wide's* analysis of the exercise of personal jurisdiction consistent with the due process clause of the Fourteenth Amendment requires some purposeful limited contacts with the forum in question by the party over whom jurisdiction is sought.

In *C & H Transportation Co.*, the Fifth Circuit Court of Appeals found that Jensen & Reynolds, a California corporation not licensed to do business in Texas and maintaining no offices or business relations in Texas, had insufficient Texas contacts for personal jurisdiction consistent with the limitations of the due process clause of the Fourteenth Amendment, despite Jensen's direct negotiations with a Texas based motor carrier, including a telephone conference with the carrier's Dallas, Texas main office, for transportation of equipment from Louisiana to the state of Washington. The court found Jensen's contacts with C & H Transporation and the state of Texas to be an isolated incident, and, as such: "...'insufficient to be characterized as purposeful activity invoking the benefits and protections of the forum state's laws.' " 719 F. 2d at 1270, quoting from *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F. 2d 1026, 1029 (5th Cir. 1983), petition for cert. filed 52 U.S.L.W. 3028 (U.S. Aug. 2, 1983) (No. 83-122). Indeed, as the court points out, extensive communications and at least one visit to the state of Texas in the development of a contract were found by the Fifth Circuit to be insufficient minimum contacts for the exercise of personal jurisdiction in *Hydrokinetics*.

In making its decision, the Fifth Circuit Court of Appeals points out that the Texas Supreme Court's recent decision in *Hall v. Helicopteros Nacionales*, 638 S.W. 2d 870 (Tex. 1982), cert. granted _____ U.S. _____, 103 S. Ct. 1270, 75 L. Ed. 2d 493 (1983), far from eliminating the requirement for the exercise of minimum purposeful contacts with the forum state for the constitutional exercise of personal jurisdiction, instead

recognizes sufficient purposeful contacts as its threshold standard.[2]

The Fifth Circuit's opinion in *C & H Transporation Co.* clearly reaffirms that court's post-*World-Wide Volkswagen* interpretation of the requirements for exercise of personal jurisdiction consistent with the due process clause of the Fourteenth Amendment in direct conflict with the opinion of the Seventh Circuit Court of Appeals below. The Fifth Circuit, together with the Third and Ninth Circuit Courts of Appeals, have, since this Court's decision in *World-Wide Volkswagen*, clearly recognized the limitation of minimum contacts on the exercise of personal jurisdiction consistent with the due process clause of the Fourteenth Amendment.

As these courts have understood *World-Wide Volkswagen*, the bare stream of commerce analysis applied by the Seventh Circuit Court of Appeals in this case is a constitutionally insufficient test; in addition to presence in a stream of commerce, these courts understand the test explained by this Court in *World-Wide Volkswagen* to require that a party must have sufficient purposeful minimum contacts with the forum jurisdiction for the exercise of personal jurisdiction to comport with the requirements of the due process clause of the Fourteenth Amendment.

---

[2] Respondent F. W. Woolworth Company and Travelers Insurance Company's citation of this case does not include this Court's March 7, 1983 grant of a writ of certiorari to the Texas Supreme Court. Respondent's citation of *Hall* is from the dissent in this case, and is for a proposition not encompassed by the question presented on appeal [51 U.S.L.W. 3663 (U.S. March 1, 1983) (No. 82-1127)]. Petitioner Bunnan Tong believes that this Court's grant of certiorari calls into question the type, number and quality of contacts that a party must have within a forum before that forum's courts may exercise jurisdiction. In contrast to the defendant in *Hall*, petitioner Bunnan Tong has no direct contacts, either related or unrelated to the cause of action in this case.

Clearly, there is a substantial conflict between the interpretation given to *World-Wide Volkswagen* by the Seventh Circuit Court of Appeals in its decision below and the understanding of that case by the Courts of Appeals for the Third, Fifth and Ninth Circuits. Petitioner Bunnan Tong & Company, Ltd. respectfully requests that this Court grant its petition for writ of certiorari to resolve this conflict.

Respectfully submitted,

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January 4, 1984

NO. 83-889

In the Supreme Court of the United States

October Term, 1983

BUNNAN TONG & COMPANY, LTD.,
Defendant-Petitioner,

vs.

F.W. WOOLWORTH COMPANY and
TRAVELERS INSURANCE COMPANY,
Defendants-Respondents,

and

TELINA NELSON, a minor, by Cindra R. Carson, Guardian ad Litem, GERALD NELSON, and SHERRY NELSON,
Plaintiffs-Respondents.

On Petition For a Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

QUESTION PRESENTED FOR REVIEW

Where a Hong Kong distributor has indirectly but knowingly served the entire United States market with its products, does an exercise of personal jurisdiction over that distributor in a state where one of those products caused injury violate the due process clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV (Ratified July 9, 1868)

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

NO. 83-889

In the Supreme Court of the United States

October Term, 1983

BUNNAN TONG & COMPANY, LTD.,
Defendant-Petitioner,

vs.

F.W. WOOLWORTH COMPANY and
TRAVELERS INSURANCE COMPANY,
Defendants-Respondents,

and

TELINA NELSON, a minor, by Cindra R. Carson, Guardian ad Litem, GERALD NELSON, and SHERRY NELSON,
Plaintiffs-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF CASE

Since the end of World War II, Bunnan Tong & Company, Ltd. (hereinafter Bunnan Tong) has been a broker and importer of men's shirts in Hong Kong for the F.W. Woolworth Company[1] (hereinafter Woolworth). From that time until the present, Bunnan Tong engaged and

[1] The F.W. Woolworth Company has no parent company, no subsidiaries other than wholly-owned subsidiaries and no affiliates.

continues to engage in extensive business dealings with Woolworth. (A 18).

On June 6, 1966, Woolworth and Bunnan Tong entered into a series of buying agreements under which Bunnan Tong agreed that all merchandise purchased for Woolworth would be inspected by Bunnan Tong to ensure that it met the requirements of all United States government laws and regulations. Bunnan Tong also agreed to hold Woolworth harmless with regard to any claim made against Woolworth by anyone involving their merchandise. These buying agreements, and particularly the hold harmless clause and guarantee that their products would meet U.S. laws and regulations, remained essentially unchanged during the entire course of the business relationship between Bunnan Tong and Woolworth. (A 2-3).

In 1967, Charles W. Turner, an employee of Woolworth for 42 years, assumed the position as buyer of men's shirts for Woolworth. In that position he began personal dealings with the directors of Bunnan Tong, Nia Yan Chan and T. K. Tong. These dealings took him to Hong Kong on an annual basis and, in turn, the directors of Bunnan Tong made periodic trips to the corporate offices of Woolworth in New York City. At all times during the years that Charles W. Turner dealt with them, both Nia Yan Chan and T. K. Tong were fully aware of the nature and extent of Woolworth's retailing operation and that the men's shirts Woolworth purchased through Bunnan Tong were retailed in the ordinary course of trade throughout the United States. (A 18-19).

On October 28, 1976, pursuant to a buying agreement between Bunnan Tong and Woolworth, an order was placed for 4,300 dozen boy's 100% cotton flannel shirts. This order and a confirmation order were directed from

Woolworth's New York, New York office to Bunnan Tong & Company, Ltd., 1441 Prince's Building, Hong Kong. Each document contained the following:

> CONDITIONS: In accepting this order shipper or seller agrees to idemnify save harmless and defend F.W. Woolworth Co. against any claim or action involving this merchandise or arising out of its sale or possession by F.W. Woolworth Co. and against any loss damage or expense incurred by F.W. Woolworth Co. in connection therewith.

These flannel shirts were to be packaged at the factory with Woolworth's "Topsall" label for Woolworth and shipped by April 1, 1977. The flannel shirts were subsequently manufactured by the United Garment Manufacturing Company, Ltd., of Hong Kong (A 17), and shipped by Woolworth to ports located in New York, Philadelphia, San Francisco and Los Angeles. (A 14).

During the months preceding Christmas of 1977, the plaintiff's mother, Sherry Nelson, was shopping for Christmas gifts in a F.W. Woolworth store in Rice Lake, Wisconsin. Gerald Nelson and Sherry Nelson are residents of the State of Wisconsin and are the natural parents of the minor plaintiff, Telina Nelson. Mrs. Nelson noticed a display while in Woolworth that contained a number of boy's cotton printed flannel shirts bearing the label "Topsall". Mrs. Nelson was attracted to the flannel shirts and purchased two, one for her daughter Telina, then four years old, and one for her other daughter, Staci. (A 7-12).

One of the shirts purchased by Mrs. Nelson was given to Telina for Christmas in 1977. Telina continued to wear the shirt as needed until October 28, 1978, when while in the process of wearing said shirt, she came into contact

with an open flame from a Park Industries, Inc. butane cigarette lighter. This caused the "Topsall" cotton flannel shirt to ignite inflicting horrific and permanent injuries.

On September 14, 1981, by her guardian ad litem, Telina Nelson filed a diversity action against Woolworth, The Travelers Insurance Company[2] and the manufacturer of the butane lighter, Park Industries, Inc. Her Complaint was amended on June 2, 1982 adding Bunnan Tong & Company, Ltd. and United Garment Manufacturing Company, Ltd. as defendants.

On September 16, 1982, however, the District Court entered an Order dismissing Bunnan Tong for lack of personal jurisdiction. This Order was reversed by the United States Court of Appeals for the Seventh Circuit on September 16, 1983, and Bunnan Tong has petitioned the Supreme Court of the United States to issue a writ of certiorari to review the judgment of the Seventh Circuit.

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[2] The Travelers Insurance Company is an insurer of Woolworth. It is a wholly-owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries or affiliates of its own. The Travelers Corporation, however, has the following wholly-owned subsidiaries which may be considered affiliates to The Travelers Insurance Company: The Charter Oak Fire Company; Constitution Plaza, Inc.; Derby Advertising, Inc.; Keystone Custodian Funds, Inc.; The Massachusetts Companies, Inc.; The Phoenix Insurance Company; The Plaza Corporation; The Prospect Company; Travelers Equities Sales, Inc.; The Travelers Indemnity Company of America; The Travelers Indemnity Company; The Travelers Indemnity Company of Illinois; The Travelers Indemnity Company of Rhode Island; The Travelers Insurance Company of Illinois; The Travelers Investment Management Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company and The Travelers Marine Corporation.

SUMMARY OF ARGUMENT

The Petitioner has failed to show that a conflict exists within the meaning of Supreme Court Rule 17.1(a). Those cases cited either do not employ a stream-of-commerce analysis or merely exemplify a rejection of its use under certain facts by courts that otherwise have approved the doctrine.

The Petitioner also seeks to show that this case involves important questions of federal law which have not been but should be decided by the Court. Each proposed question, however, either has been settled by the Court or is not material to a determination of whether Bunnan Tong is amenable to suit in Wisconsin.

ARGUMENT

The first issue before the Court involves whether a federal court of appeals determination that the Petitioner is amenable to suit in Wisconsin, even though the Petitioner has no direct contact with this state, is in conflict with a decision of another federal court of appeals on the same matter. Woolworth contends that it does not conflict.

The United States Court of Appeals for the Seventh Circuit determined that the stream-of-commerce doctrine was controlling and based its reversal of the District Court on a review of the following undisputed facts:

> (1) That the Petitioner introduced 51,600 men's flannel shirts into a stream of commerce that led to a market consisting of all 50 states of the United States;
>
> (2) When so doing, the Petitioner was knowledgeable of the extent of the market for which these shirts were intended and fully expected them to reach this market;

(3) The Petitioner derived a substantial economic benefit from the introduction of the product into Woolworth's nation-wide market; and

(4) The product which allegedly caused injury, along with several others, arrived in Wisconsin for no other reason but nation-wide marketing of which the Petitioner was aware and from which they derived substantial economic benefits.

The Petitioner contends that the opinion of the Seventh Circuit conflicts with opinions from the Third, Fifth and Ninth United States Courts of Appeals. In support of this contention, they cite *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175 (9th Cir. 1980), *cert. denied*, 449 U.S. 1062 (1980), *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981) and, *Talbot Tractor Company, Inc. v. Hinomoto Tractor Sales, USA*, 703 F.2d 143 (5th Cir. 1983).

Not one of the cases cited by the Petitioner is related either by facts or through application of law to the Seventh Circuit's decision in the instant case. *DeJames* did not "recognize that a defendant . . . manufacturing ships . . . was not subject to personal jurisdiction in a state where those ships could regularly be expected to dock." (Petitioner's Brief at 3). In *DeJames*, the opinion of the United States Court of Appeals for the Third Circuit pointed out that the plaintiff could direct the court's attention only to one contact that Hitachi had with the State of New Jersey, i.e., the vessel on which Hitachi had done conversion work was docked in Camden, New Jersey when the plaintiff sustained his injury. *DeJames*, 654 F.2d at 284.

The Third Circuit correctly characterized the plaintiff's reliance on numerous cases applying the stream-of-commerce doctrine as the basis for jurisdiction over Hitachi as "misplaced". *DeJames,* 654 F.2d at 285. Hitachi did not use a distributive or marketing scheme whereby they sought to have the vessel marketed and sold through channels to a New Jersey resident. It was significant that Hitachi did not seek to receive an economic benefit, either directly or indirectly, from the docking of the vessel in New Jersey. 654 F.2d at 285. It is interesting that the court cited with approval those cases which utilized the stream-of-commerce rationale contrasting them with the facts of *DeJames.* It is even more interesting that the precise requirements which the court found absent are prominently undisputed with regard to Bunnan Tong's conduct in the instant case.

The Petitioner's reliance on *Kramer Motors, Inc. v. British Leyland, Ltd.,* 628 F.2d 1175 (9th Cir. 1980) *cert. denied,* 449 U.S. 1062 (1980), is equally misplaced. In *Kramer,* the United States Court of Appeals for the Ninth Circuit did not affirm, reject nor even discuss the stream-of-commerce doctrine with regard to its impact on personal jurisdiction. In fact, there was no product alleged to have caused injury and the case was analyzed in terms of whether the defendant's activities were systematic and continuous, not in terms of the rationale applied by the Seventh Circuit.

Bunnan Tong has also cited *Insurance Company of North America v. Marina Salina Cruz,* 649 F.2d 1266 (9th Cir. 1981), and claims that this case along with *Kramer* demonstrates a conflict with the Seventh Circuit's opinion on the same matter. Clearly, in *Insurance Company of North America* the Marina Salina Cruz, although aware that the ship on which they were work-

ing would be used by its owners in Alaskan waters, never intended to serve the Alaskan market. As in *DeJames*, a wholly inappropriate attempted utilization of the stream-of-commerce doctrine to sustain jurisdiction was properly rejected.

A final case cited by Bunnan Tong in support of its contention is that of *Talbot Tractor Company, Inc. v. Himomoto Tractor Sales, USA, Inc.*, 703 F.2d 143 (5th Cir. 1983). Here the United States Court of Appeals for the Fifth Circuit did provide a brief analysis of the facts under the stream-of-commerce doctrine but found the doctrine inapplicable because of the absence of a demonstrable financial benefit realized by Kanematsu-Gosho (U.S.A.), Inc. The same is not true with regard to Bunnan Tong as seen in the method by which they were compensated and the quantity and nature of merchandise they purchased for shipment.

The Petitioner has cited four isolated decisions by three United States Circuit Courts of Appeals claiming that the stream-of-commerce analysis found in the Seventh Circuit's opinion is in conflict with those cases on the same issue. However, if any rule can be taken from the Third Circuit's opinion in *DeJames* it is one approving use of the stream-of-commerce doctrine to sustain jurisdiction under facts such as those constituting the record in the instant case. In view of the Ninth Circuit opinions in *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) and *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155 (9th Cir. 1980), the former rendered prior to *Kramer* and the latter one month afterward, Bunnan Tong's argument that the Ninth Circuit is in conflict with the Seventh Circuit cannot be justified. Both *Duple Motor Bodies* and *Plant Food Co-op* specifically discussed and approved the doc-

trine where defendants did not have contact with the forum nor control of the delivery network, but where each expected the product to reach the market through a known stream-of-commerce and each derived economic benefit from the introduction of the product into that stream.

Likewise, while Bunnan Tong contends that *Talbot Tractor Company* is a rejection of the stream-of-commerce doctrine, the same court in *Oswalt v. Scripto, Inc.*, 616 F.2d 161 (5th Cir. 1980) specifically analyzed and approved its use under facts identical in all significant respects to those underlying the opinion of the Seventh Circuit. The Petitioner has failed to cite one federal appellate court case which conflicts with the ruling below. For this reason, Petitioner's application for the issuance of a writ of certiorari under Supreme Court Rule 17.1(a) must fail.

* * *

As a second basis for its request that a writ of certiorari issue, Bunnan Tong has proposed three questions which they claim are of such importance that the immediate attention of the United States Supreme Court is required. They claim that these questions have not been but should be settled by the Court so that foreign manufacturers and distributors can structure their business relationships appropriately to limit jurisdictionally significant contacts to a predictable number of forums.

It is also suggested that the Court must speak to whether due process protections extend equally to citizens and non-citizens alike and whether existing due process considerations should apply in the same manner to those entities that control a distribution network as those who do not.

Woolworth concedes that if the structure of business relations by foreign manufacturers and distributors were jurisdictionally significant, one could predict with certainty where those manufacturers and distributors could or could not be forced into court to defend lawsuits arising from injuries caused by their products. The formal structuring of business relationships, however, is not and should not be the test. The defendant's conduct must be examined. As stated:

> The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co. v. Washington,* 326 U.S., at 319, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. at 297, 62 L.Ed. 2d 490, 501, 100 S.Ct. 559 (1980). The element of predictability is derived from the structure of the defendant's conduct and not from the manner in which they structure their business relationships. This was formulated in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154(1945), discussed and followed in *Gray v. American Radiator and Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961), later discussed in *Oswalt,* and then in *World-Wide Volkswagen Corp.* It is not an issue that is in need of settling by the Court. In the instant case, Bunnan Tong knowingly structured their conduct to serve a market indirectly that included every state in the United States. Under existing and settled law they must answer in those forums which comprise the market. *Oswalt,* 616 F.2d at 199, 200.

The question regarding whether due process considerations extend to citizens and non-citizens alike was ad-

dressed indirectly (albeit in the equal protection context) in the recent case of *Plyler v. Doe,* 457 U.S. 202, 72 L.Ed. 2d 786, 102 S.Ct. 2382 (1982) where the court held to the understanding that "the protection of the Fourteeth Amendment extends to anyone, citizen or stranger . . ." 457 U.S. at 215. This holding was cited by the Supreme Court of Texas in *Hall v. Helicopteros Nacionales De Colombia, S.A. ("Helicol"),* Tex., 638 S.W.2d 870 (1982) wherein it is stated:

> . . . cases dealing with jurisdictional issues invariably apply the same due process to citizens and non-citizens alike. (citations omitted).

In any event, since Bunnan Tong has in fact been afforded the same due process considerations afforded to U.S. citizens under the stream-of-commerce doctrine, the question is not relevant to the instant case. Bunnan Tong's collateral question concerning the effect on jurisdiction where co-equal sovereigns are involved is without merit because there is no contention that Bunnan Tong and Company, Ltd. is wholly or partially owned by a sovereign state.[8]

The last question raised by the Petitioner focuses on their underlying contention that the Seventh Circuit misapplied a rule of law propounded by the United States Supreme Court in *World-Wide Volkswagen Corp.* They concede that Bunnan Tong's conduct may subject it to liability in tort but claim that, since Bunnan Tong did not actively participate in Woolworth's distribution network

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[8] In *Kramer* and *Insurance Company of North America,* the Court duly considered the impact of co-equal sovereignty on personal jurisdiction insofar as British Leyland, Ltd. was 95% owned by the British government and the Marina Salina Cruz was 100% owned by the Mexican government.

or have any direct contacts with the United States, it cannot be subject personally to jurisdiction in Wisconsin.

Through the discussions in *World-Wide Volkswagen Corp.*, *Gray*, and *Oswalt*, it is clear that under existing law the control or participation in a distribution network constitutes the type of affiliating circumstance that is jurisdictionally significant. It is equally clear, however, that the lack of participation in a distribution network is not jurisdictionally fatal where the defendant introduces his products into a stream-of-commerce with the expectation that those products will be purchased by consumers in the forum state. *World-Wide*, 444 U.S. at 298.

Bunnan Tong had knowledge and expectation that their products would be purchased and were being purchased in all fifty states of the United States. They do not deny their knowledge and expectation that the flannel shirt in question, along with many others, would be purchased at a retail level by American consumers in every state where Woolworth marketed. The constitutionally cognizant contacts are the shirts in question, several of them, that were sold by Woolworth at their store in Rice Lake, Wisconsin. The affiliating circumstances are Bunnan Tong's conduct, knowledge and expectation with regard to Woolworth's market and the path these shirts would travel. The facts of the instant case do fit like a glove, irrespective of control over the distribution network, under the rules concerning indirect service of a market and expectations of purchase that were set forth in *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 298. There is no substantial question of federal law and the opinion of the Seventh Circuit is in accord with the opinion of the United States Supreme Court in *World-Wide Volkswagen Corp.* The issue has been settled.

CONCLUSION

The Petitioner has failed to demonstrate either a conflict among federal courts of appeals on the same matter or the existence of an important question of federal law which has not been but should be settled by the Court. Accordingly, it is requested that their Petition for the issuance of a writ of certiorari be denied.

Respectfully submitted,

FRANK T. CRIVELLO
Counsel of Record
FRANK L. STEEVES
Riordan, Crivello, Carlson,
Mentkowski & Henderson
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722

Attorneys for the Respondents,
F.W. Woolworth Company and
Travelers Insurance Company

APPENDIX OF RESPONDENTS

BUYING AGREEMENT

[*Woolworth letterhead omitted*]

July 1, 1976

Bunnan Tong & Company Ltd.
Room 902, Tong Yang Building
112-5 Sokong-Dong, Chung-ku,
P.O. Box 5647
Seoul, Korea

FACTORY 1019
BUYING AGREEMENT

Gentlemen,

This letter will confirm the arrangements between us, pursuant to which you will act as a special Buying Representative for us in the country, countries, or portions thereof, described in Item-1 of the attached Schedule "A" (hereinafter called the Territory.) The terms and conditions covering the relationship between you and us are set forth below.

1. You shall perform for us the following services:

a) You will actively investigate buying possibilities which might be of interest to this Company in the Territory both on your own initiative, and as requested by us.

b) You will purchase in the Territory, and forward to us, samples of merchandise as requested in writing by us. We will reimburse you for the price to you of such samples (and related shipping costs) : provided that you shall invoice us for all such amounts at the time of shipment. If you forward samples to us which have not been requested by us, you will assume all costs and expenses arising out of, or related

to, such samples. In connection with samples requested by us, or otherwise provided, you will forward a Price List in the form shown in instructions furnished by our Traffic Department. All amounts shown on said Price List shall be in United States dollars.

c) Contracts of this Company for the purchase of merchandise in the Territory will be placed by you directly with the manufacturer. (Wherever the word "manufacturer" is used herein it shall be taken to mean the seller of merchandise, and also means to include the Buying Representative as our agent.)

d) All merchandise purchased by us shall first be inspected and approved by you — before being shipped to us. You agree that your approval will be granted only if such merchandise, (i) conforms to our specifications, as set forth in the applicable contract (and all amendments thereto) and is not defective in any respect, (ii) meets the requirements of all U.S. Government laws and regulations, (iii) is packaged, labeled, and invoiced, in accordance with the instructions set forth in the applicable contract, (iv) is packaged in a manner which will insure its safe transportation to this Company's stores or warehouses.

e) Prepare and forward invoices covering each shipment of merchandise, said invoices to be in the form shown in instructions furnished by our Traffic Department, — and all amounts shown on said invoices shall be in United States dollars.

f) In the case of claims of this Company against manufacturers resulting from defective, or otherwise unacceptable, merchandise (including, but without

limitation — defects discovered after receipt, and resale, by F. W. Woolworth Co.) — you will act as this Company's representative in endeavoring to obtain reimbursement from the manufacturer for the defective merchandise, and will arrange to have the full amount, of such reimbursement, promptly forwarded to us.

g) You agree to stand behind all of the merchandise which you have furnished to us, which you are now furnishing to us, or which you may furnish to us — at any future date — and you agree that you will hold us harmless in regard to any claims, which may be made against us — by anyone involving this merchandise, or its sale by us, except for any claims arising from fault or negligence on our part.

h) In the event that we send to you — Labels and Tags, for use by a manufacturer, it is understood that you will pay us for such labels and tags — and rebill the same to the manufacturer. If, for any reason, you do not receive payment from any manufacturer for such labels and tags — we will reimburse you for any loss.

i) You agree that you will work to the extent possible, with reputable manufacturers (with sound credit ratings) — and who are capable of meeting the terms of our contracts. If we shall so request, you agree to supply us with credit reports, and other information, concerning manufacturers located in the Territory.

2. In consideration of the performance by you of services as our Buying Representative in the Territory, including, but without limitation, the services set forth in

Paragraph-1 above, we agree to pay you (unless a lesser Commission shall be agreed upon by you and us, with respect to any specific transaction or transactions) the percentage set forth . . . . . in Item-2 of the attached Schedule "A" of the purchase price of merchandise purchased by us during the term hereof in the Territory — such purchase price being the F.O.B. Price, provided that, if a different rate of Commission is stated in our purchase contract, such different rate shall apply with respect to such contract. The amounts specified in this Paragraph-2 shall represent your entire compensation hereunder, and you shall not be entitled to any other further compensation, payment, or reimbursement (unless otherwise specified in Item-3 of the attached schedule.) — except that you shall receive reimbursement for the cost to you of samples (and related shipping costs) as provided in Paragraph-1(b) hereof. It is understood that all consideration provided for hereunder will become payable only when the merchandise has been properly delivered on board to a carrier, for shipment to us.

3. It is understood, and agreed, that you are acting solely in the capacity of independent contractor. No contract for the purchase of merchandise by this Company shall become effective unless approved in writing by us, it being understood that you are not authorized to enter into any agreement, or commitment, on our behalf — without receiving, in each case, our prior written approval. No verbal authorizations shall be effective unless confirmed by cable, or other writing, by us. You agree that you will not characterize yourselves, in any way, other than as "special Buying Representative in (here insert name of Territory) of F. W. Woolworth Co."

4. The purchase price of all merchandise contracted for by us will be stated in United States dollars. Our sole

responsibility shall be to pay for such merchandise, following its proper delivery on board to a carrier, the amount in United States dollars — set forth in our contract, and all arrangements made by you with manufacturers, will be on the basis that the risk of fluctuations in exchange rates will be borne by the manufacturer (whether or not specific provision therefor is set forth in our contract), it being understood that you will bear all losses to us resulting from failure by you to make arrangements on such basis. Similarly, all payments to you by us will be made in United States dollars computed on the basis of purchase price in United States dollars set forth in the respective contracts. Such payments will be made by Letters of Credit, or such other means, as we may select.

5. The Company assumes no obligations for merchandise not delivered on board to a carrier, as required in Paragraphs-2 and -4 hereof, unless such obligations are specifically assumed by us in writing, including, but not limited, to such obligations as purchase of raw material for conversion into finished articles, assembly, packaging and inspection.

6. Additional or special provisions, if any, relating to the relationship between us, are set forth in Item-3 of the attached Schedule "A" which provisions are hereby incorporated herein by reference.

7. It is understood, and agreed, that the relationship herein provided for is not exclusive — and that this Company shall have the right to enter into arrangements with other special Buying Representatives, or manufacturers in the Territory, without obligation to you.

8. This agreement may be terminated by either party, by giving at least 60-days prior written notice of the effective date of such termination, to the other party.

9. Upon termination of this agreement, (a) all rights and obligations of the parties hereto shall cease and terminate, except as to rights and obligations accrued prior to the date of such termination, (b) we shall have the right to deal with all manufacturers, either directly, or through one or more other special Buying Representatives, without further obligations to you, and (c) you shall turn over to us — any and all copies of contracts and other information in your files, relating to our arrangements with manufacturers (it being understood that all such contracts and other information shall be treated by you as confidential, and shall not be disclosed by you to any third party, either during or after the term hereof.)

10. This Agreement shall be the only agreement between our Company and you. Any previous agreements between us are hereby cancelled, and made null and void.

If the foregoing terms and conditions are satisfactory to you, please sign and return to us — original copy of this letter, and retain the enclosed duplicate copy for your files, whereupon this letter shall constitute a binding agreement between us, effective as of the date of this letter.

Very truly yours
F. W. WOOLWORTH CO.
/s/ C. L. Rhodes

C. L. RHODES
Director of Import Buying & Sales

Agreed to:
/s/ T. K. Tong

By T. K. TONG, MANAGING DIRECTOR
BUNNAN TONG & CO. LTD.

Date 18 June, 1976.

EXCERPTS FROM DEPOSITION OF SHERRY NELSON CONDUCTED ON JULY 7, 1982

Sherry Nelson, having been first duly sworn, testified as follows:

(Adversely examined by Mr. Crivello)

[Page 27]

Q. Can you tell me how long Telinda had had this shirt before this incident occurred? A. It was bought in December and she received it for Christmas so by the time the accident happened it would have been about ten months.

Q. I have indicated that it was purchased on December 4 of '77? A. I'm not sure about the date, but it was the first weekend of December.

* * *

[Page 31]

Q. Did you know when you went into Woolworth's what you were going to buy? A. No.

Q. What made you decide, if anything, other than possible need to get a shirt for Teli? A. We saw them there. They had a sale on them and it was a good buy and we decided because we camp a lot and because the evenings are chilly and so forth we decided to buy flannel shirts.

Q. And they were on sale? A. Yes.

Q. Did you first become aware of that when you got into the store and you saw this counter sale and you went over there? A. Yes.

[Page 32]

Q. And you go camping a lot so a heavier shirt would be good for Teli? A. Right.

Q. Okay. Can you tell me where this counter was located in relation to any entrances to that store? A. It would have been close to the mall entrance in the children's section.

* * *

[Page 33]

Q. The Woolworth's store carries many different items, is that correct? A. Correct.

Q. Can you tell me how large that counter was? A. No, I can't.

Q. When you say it was a counter, was it a display counter, was it a display window? What type of counter was it? A. What do you mean by display counter?

Q. Were a number of shirts or a number of items on the counter

[Page 34]

or was this the only one on there or were there just a couple of them on there? A There were several on the counter on the top.

Q. Several shirts? A. Yes.

Q. Was there any other item other than this type of shirt on that counter? A. No.

Q. Were there any signs on the counter? A. Only a sale sign.

* * *

[Page 35]

Q. Okay. How many shirts did you buy that day from that particular counter? A. I bought two.

Q. And for whom? A. I bought one for Staci and one for Teli.

Q. All right. Do you know if the shirt you bought that day for Staci was the one she had on on the date or if she had that one on on the date this incident occurred? A. I don't recall what shirt she had on that day.

Q. Were these shirts in packages or were they folded not in

[Page 36]
packages? What was the situation? A. They were folded in a cellophane package of some sort.

Q. Could you see obviously through the cellophane? A. Yes.

Q. Okay. Did the cellophane have any printing on it? A. Yes, it did.

Q. What did it say? A. I don't recall exactly.

Q. Do you recall whether the printing was large or small? What can you tell me about the printing? A. All I can recall is that it was written at an angle. It was in a print and it was white.

Q. The package was cellophane? A. Yes.

Q. There was printing on it as opposed to writing on it? A. Yes.

Q. And the printing was in white? A Yes.

Q. Anything else — strike that. You say it was on a diagonal? A. Yes.

Q. How do you know that that is the shirt that Teli had on on the date of this incident? A. Because of the accident I remember it.

Q. Anything else that leads you to the conclusion that the shirt Teli had had on on the date of this occurrence

[Page 37]

was the one you purchased in the first week of December, '77? A. Yes. My girlfriend was there and bought shirts of the same type.

* * *

Q. Do you recall what size shirt you bought that day or what

[Page 38]

size shirts? You say you bought two of them. What sizes were those shirts? A. I bought a size 8 and a size 10.

Q. Did you give that shirt to Teli for Christmas? A. Yes, I did.

* * *

Q. What do you remember about looking for sizes? A. Just that I found the size that would fit them the closest. Eventually they would grow into them so I went ahead and bought them anyway.

Q. What sizes — or strike that. Was the size 10 that you purchased off of this same counter? A. Yes.

Q. So the 8 and 10 were both there?

[Page 39]

A. Yes.

Q. Were there any other sizes on that counter? A. I remember they went up to size 14.

* * *

Q. How many labels, if more than one, were you able to visualize when you were shopping for this shirt? A. Only one.

Q. Would that be the tag on the back of the neck? A. Yes.

Q. How large was that tag? A. I don't know.

* * *

[Page 40]

Q. Do you remember anything else about that label that was either written on it that you saw that you remember now? A. I remember the name "Tops All" or "Top All" printed on it.

Q. Do you know what color that was in? A. No, I don't.

Q. Were the labels on the size 8 and the size 10 identical except for size designations? A. As far as I can remember they were.

* * *

[Page 43]

Q. Did your girlfriend, did you say she bought some shirts off the same counter? A. Yes.

Q. Do you recall how many she purchased?

[Page 44]

A. She bought four.

Q. Do you recall what sizes they were? A. No, I don't.

Q. Were they for her children? A. For her son.

* * *

Q. When you opened the shirt at Christmas time, were you able to determine if there were any other labels other than this

[Page 45]

one that you recall and have told us about? Were there any other labels in the shirt anyplace? A. Not that I recall.

Q. None at all? A. Not that I recall.

Q. Okay. How about a laundering tag? A. It's possible, but I don't remember.

Q. You just don't remember any others than this one? A. I don't.

Q. Is that correct? A. Correct.

Q. Did Teli wear this shirt from the Christmas time throughout the winter season? A. Yes.

Q. Can you tell me approximately how many times she wore that shirt before this incident occurred? A. I can't tell you. They just wore it whenever the weather needed it, warranted it.

Q. The weather through — A. Through the wintertime.

* * *

AFFIDAVIT OF NAI YAN CHAN

[Venue and caption omitted]

I, Nai Yan Chan, being first sworn on oath, depose and state as follows: —

(1) That I have been a Director of Bunnan Tong and Company Limited of Hong Kong (hereinafter called "the Company") since 1974 and I was a director of the Company on or about October 28, 1978 and still am a director of the Company.

(2) That I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

(3) That the Company is duly incorporated under the laws of Hong Kong and is an exporter and agent for f· ·ign buyers of general merchandise

including but not limited to textile products manufactured in Hong Kong and other South East Asian countries.

(4) That the Company has never been licensed to do business in the State of Wisconsin.

(5) That the Company does not own any real or personal property within the State of Wisconsin.

(6) That the Company does not employ any individuals within the State of Wisconsin.

(7) That the Company does not maintain any office in the State of Wisconsin

(8) That the Company has never had any agents, sales persons, distributers or advertised in the State of Wisconsin.

(9) That the Company has never made any business calls to any contacts in the State of Wisconsin.

(10) That the Company has never had any advertising done on its behalf in the State of Wisconsin to solicit business.

(11) That F. W. Woolworth Company is not nor has it ever been the Company's agent or representative in the State of Wisconsin.

(12) That the Company has never serviced any of its products in the State of Wisconsin.

(13) That the Company acted as the buying representative of F. W. Woolworth Company in Hong Kong whose staff came to Hong Kong to place orders for shirts carrying label "TOPSALL" (hereinafter called "the said goods") with the Company in early 1976. The Company then pur-

chased the said goods on behalf of F. W. Woolworth Company at an agreed commission from United Garment Manufacturing Company Limited of 1151-1153 Canton Road, First Floor, Hong Kong, F.O.B. Hong Kong.

(14) That the said goods were delivered by the Company to WESTERN NAVIGATION (FAR EAST) LIMITED, formerly of Nos. 15-19, Ha Heung Road, 6th floor, To Kwa Wan, Kowloon presently of Rooms 712-715, world Commerce Centre, 11 Canton Road, Tsimshatsui, Kowloon, forwarders in Hong Kong nominated by F. W. Woolworth Company, who in turn on the instructions of F. W. Woolworth Company arranged to have the said goods shipped to New York, Boston, Philadelphia, San Francisco and Los Angeles. None of the said goods were shipped directly to anywhere in the State of Wisconsin.

(15) That the Company has not done anything with the goods in question to prepare them for sale.

(16) That physical control and custody of the said goods passed to F. W. Woolworth Company once the said goods were delivered over the rail of the vessel sailing to the United States.

(17) That F. W. Woolworth Company paid for the insurance and the cost of shipping the said goods from Hong Kong to their destinations in the United States.

(18) That the Company has never received any direct benefit or protection as a result of laws of the State of Wisconsin in the course of its business.

(19) That the Company has never been involved in a suit in the State of Wisconsin, either as a plain-

tiff or a defendant, or submitted to the jurisdiction of the Wisconsin Courts.

(20) That there was no service of summons upon the Company within the State of Wisconsin.

(21) That the Company received the Summons and Complaint in Hong Kong.

/s/ Nai Yan Chan

Nai Yan Chan

Subscribed and sworn to before me this
17th day of August, 1982.

/s/ Kenneth Lo

Notary Public, Hong Kong

KENNETH LO
Notary Public
Hong Kong

AFFIDAVIT OF PETER CHOI

[*Venue and caption omitted*]

I, Peter Choi, being first duly sworn, depose and state as follows:

1. I have been a director of United Garment Manufacturing Company, Ltd., of Hong Kong (hereinafter "the Company") since 1976; that I was a director of the Company on or about October 28, 1978; and that I currently am one of three directors of the company.

2. I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

3. The Company was organized as a limited liability company in Hong Kong in 1957 and is presently duly incorporated under the laws of Hong Kong. The Company manufactures textile products in Hong Kong.

4. The Company is not now licensed and has never been licensed to do business in the state of Wisconsin, or elsewhere in the United States.

5. The Company does not now own and has never owned any real or personal property within the state of Wisconsin or elsewhere in the United States.

6. The Company does not now employ and has never employed any individuals within the state of Wisconsin or elsewhere in the United States.

7. The Company does not now maintain and has never maintained any office in the state of Wisconsin or elsewhere in the United States.

8. The Company has never had any agents, representatives, employees, sales persons or distributors in the state of Wisconsin or elsewhere in the United States.

9. Neither the Company nor any representative of the Company has ever made any business trips or calls to anyone in the state of Wisconsin or elsewhere in the United States.

10. The Company has never had any advertising done on its behalf to solicit business in the state of Wisconsin or elsewhere in the United States.

11. Neither F. W. Woolworth Company nor Bunnan Tong and Company, Ltd. ("Bunnan Tong") are now nor ever have been the Company's agent or representative in the state of Wisconsin or elsewhere in the United States.

12. The Company has never serviced any products in the state of Wisconsin or elsewhere in the United States.

13. The Company sold certain "Topsall" shirts to Bunnan Tong in Hong Kong with deliveries to Bunnan Tong in Hong Kong in early 1977. Other than these deliveries, the Company never sold "Topsall" shirts.

14. Thereafter, the Company had nothing further to do with or further interest in the "Topsall" shirts sold to Bunnan Tong.

15. The Company has never received any direct benefit or protection as a result of the laws of the state of Wisconsin in the course of its business.

16. The Company has never been involved in a suit in the state of Wisconsin, either as a plaintiff or a defendant, or submitted to the jurisdiction of the Wisconsin courts.

17. There was no service of summons upon the Company within the state of Wisconsin.

18. The Company received the summons and complaint in this action in Hong Kong.

DATED: November 12, 1982

/s/ Choi

Peter Choi For Wing

Consulate General of the)
United States of America) SS:
at Hong Kong)

Subscribed and sworn to before me
this 12th day of November, 1982.

/s/ Barbara Tobias

Barbara Tobias
American Consul

AFFIDAVIT OF CHARLES W. TURNER
(Turner Affidavit I)

[*Venue and caption omitted*]

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. F. W. Woolworth Company of the United States has dealt regularly and extensively with Bunnan Tong & Company, Ltd., as a broker and importer of men's shirts and other merchandise, since the end of World War II; In addition to dealing with F. W. Woolworth Company of the United States, Bunnan Tong & Company, Ltd.,

has also, since the end of World War II, engaged in extensive business dealings, on a similar basis, with F. W. Woolworth Company of Canada, United Kingdom and West Germany.

4. In your affiant's personal dealings and meetings with T. K. Tong over the years, Mr. Tong has expressed and indicated detailed familarity with the scope and extent of F. W. Woolworth Company's operations on an international scale.

5. During the late 1960's and early 1970's, before your affiant made yearly trips to Bunnan Tong & Company, Ltd., in Hong Kong, both T. K. Tong and Nai Yan Chan made periodic business visits to the corporate offices of F. W. Woolworth Company in New York City.

6. Both T. K. Tong and Nai Yan Chan, during the years I dealt personally with them, were fully aware that F. W. Woolworth Company retailed the shirts purchased via Bunnan Tong & Company, Ltd., throughout the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983

AFFIDAVIT OF CHARLES W. TURNER
(Turner Affidavit II)

[*Venue and caption omitted*]

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK :

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. For a period of approximately four to five years, from 1973 through 1977, United Garment Manufacturing Company, Ltd., hereinafter referred to as United Garment, was the exclusive manufacturer of all 100% cotton flannel boy's shirts purchased by F. W. Wool-

worth Company of the United States, through their broker and importer, Bunnan Tong & Company, Ltd.,

4. During said four to five year period, your affiant visited the premises of United Garment in Hong Kong at least once each year, and on these visits, had personal dealings with the owner of the company, and primarily with one of the directors of the company, Peter Choy For Wing

5. United Garment manufactured boy's 100% cotton flannel shirts specifically for Woolworths, during said years, under the Topsall label; Topsall was Woolworth's label during said years, and United Garment had full knowledge of this fact, and actually, manufactured the Topsall label on Woolworth shirts for Woolworth.

6. Peter Choy For Wing was fully aware that the shirts United Garment manufactured under the Topsall label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.

7. During said years when United Garment manufactured shirts under the Topsall label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including specifically, Men's Wear International, a division of Van Heusen, and Montgomery Ward.

8. Because of the nature of the labor market in the textile industry, for at least the last 10 years, 85% to 90%

of all cotton flannel shirts sold in the United States have been manufactured outside of the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983